

SERVICE DATE - FEBRUARY 27, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1261

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
—ADVERSE ABANDONMENT—  
SARATOGA AND NORTH CREEK RAILWAY IN TOWN OF JOHNSBURG, N.Y.

Digest:<sup>1</sup> This decision waives and exempts certain requirements that normally pertain to abandonment applications, but would be unnecessary, difficult, or impossible for the New York State Department of Environmental Conservation to comply with should it file an application for adverse abandonment.

Decided: February 26, 2018

By petition filed on December 27, 2017, the New York State Department of Environmental Conservation (the Department), seeks a waiver of certain Board regulations and exemptions from related statutory provisions regarding the filing of a third-party, or “adverse,” application for abandonment. The Department states that it intends to file for adverse abandonment of the authority of the Saratoga and North Creek Railway (SNCR) to operate over a rail line known as the Tahawus Branch (Tahawus Branch or the Line), between milepost NC 0.0 at North Creek, N.Y., and its terminus at milepost NC 29.71 near the Tahawus Mine. No reply to the petition was filed.

BACKGROUND

The Tahawus Branch was originally intended to facilitate the transportation of freight from a former mine owned and operated by NL Industries. In 2012, SNCR obtained Board authority to operate over the Tahawus Branch, which it had purchased from NL Industries the year before. See Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35631 (STB served June 1, 2012). The Department states that while it initially objected to SNCR’s application, it ultimately withdrew its objection after SNCR’s parent company, Iowa Pacific Holdings (Iowa Pacific), (1) convinced the Department that operation of the freight line would result in various employment, environmental, and energy benefits and (2) pledged that it would designate the right of way for use as a trail under the National Trails Act if it abandoned the line. (Pet. 4.) According to the Department, SNCR has never satisfied these objectives. (Id.)

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

The Department states that the Tahawus Branch, which is wholly within the Adirondack Park, crosses state-owned Forest Preserve, land that is protected as “wild forest land” under the New York Constitution. (*Id.* at 2, 5.) The Department contends that the Tahawus Branch does not carry freight and that the potential users of the Line have no current or future plans to do so. (*Id.* at 5.)<sup>2</sup> According to the Department, SNCR currently stores some unused railcars on the Tahawus Branch, has informed local authorities that it plans to store up to 2,000 railcars owned by third parties on the Line over the next 10 years, and has advised those authorities that they could pay SNCR not to undertake the storage plan. (*Id.* at 5-6.)

The Department states that it will seek adverse abandonment to protect the Forest Preserve and natural resources in the Adirondack Park. In anticipation of filing its adverse abandonment application, the Department seeks waivers of, and exemptions from, certain application requirements that it argues are inapplicable or irrelevant to the issues presented here.

## DISCUSSION AND CONCLUSIONS

The Board’s regulations impose requirements on abandonment and discontinuance applications under 49 C.F.R. pt. 1152 subparts B and C. In appropriate circumstances, however, such as the filing of an adverse abandonment or discontinuance application, the Board may waive inapplicable and unneeded regulations and grant exemptions as appropriate from statutory provisions. See Riverview Trenton R.R.—Adverse Aban.—in Wayne Cty., Mich., AB 1230 (STB served Apr. 10, 2015); Lackawaxen-Honesdale Shippers Ass’n—Adverse Discontinuance of Operating Auth.—in Wayne & Pike Ctys., Pa., AB 1110 (STB served Jan. 23, 2014).

System Diagram Map. The Department requests waivers of 49 C.F.R. §§ 1152.10-14 and § 1152.24(e)(1), which govern the filing and amending of, and providing of notice to the public through, a carrier’s system diagram map (SDM) and establish a 60-day waiting period between SDM amendments and a corresponding abandonment application. The Department also seeks an exemption from the corresponding SDM requirement at 49 U.S.C. § 10903(c)(2). (Pet. 7.) In support of its request, the Department contends a waiver is appropriate because it does not own the Tahawus Branch and cannot amend, file, or publish the SDM. (*Id.* at 8.)

The Board will grant the Department’s waiver request as to the SDM requirements because a third party generally does not have access to the SDM. See City of Chi., Ill.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1036, slip op. at 5 n.7 (STB served July 10, 2009). Further, as explained in the exemption analysis below, the Board will exempt the Department from the requirements of 49 U.S.C. § 10903(c)(2).

Service of Notice on Significant Users. The Department states that there are no shippers utilizing the Tahawus Branch and therefore asks that the requirement that it serve notice upon all significant users of the Line under 49 C.F.R. § 1152.20(a)(2)(i) be waived and that the corresponding requirement at 49 U.S.C. § 10903(a)(3)(D) be exempted. (Pet. 8.) The

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<sup>2</sup> The Department states that the only “user” of the Tahawus Branch is a rail biking operation based in North Creek that provides seasonal biking on three miles of the track. (Pet. 5.)

Department states that it will serve the notice on SNCR. Because the record indicates that no shippers are using the Tahawus Branch, the Board will grant this unopposed waiver request. Further, as explained in the exemption analysis below, the Board will exempt the Department from the requirements of 49 U.S.C. § 10903(a)(3)(D).

Service of Notice on the Governor. The Department seeks a waiver of the 49 C.F.R. § 1152.20(a)(2)(ii) requirement to serve notice on the Governor of each state directly affected by the abandonment or discontinuance. (Pet. 8.) The Department asserts that the Tahawus Branch is wholly within the State of New York, and as the Department is an executive administrative agency of the State of New York, the Governor is aware of this petition and proposed application. The Department's unopposed request is reasonable and will be granted.

Service of Notice on Labor Organizations. The Department seeks a waiver of the requirements at 49 C.F.R. § 1152.20(a)(2)(ix) and (xii) to serve notice upon the U.S. Railroad Retirement Board and the headquarters of all labor organizations representing employees on affected rail lines, respectively. (Pet. 9.) The Department argues that there is no ongoing rail service on the Tahawus Branch, so there are no railroad employees who would be affected by an adverse abandonment. (*Id.*) The Department also notes it has no information on past employees or whether SNCR's employees are represented by a union. The Department's request for waiver of service on labor organizations representing affected employees is reasonable and the Board will grant this unopposed request. However, out of an abundance of caution, the Department will be required to serve a copy of its notice of intent on the U.S. Railroad Retirement Board.<sup>3</sup>

Posting at Stations and Terminals. The Department notes that there are no stations or terminals on the Tahawus Branch and therefore seeks a waiver of the requirement under 49 C.F.R. § 1152.20(a)(3) and exemption from the corresponding requirement at 49 U.S.C. § 10903(a)(3)(B) to post notice at each station and terminal on the Line. (Pet. 9.) The Board will grant this unopposed waiver request, and as explained below, will grant the exemption request as well. See Alloy Prop. Co.—Adverse Aban.—Chi. Terminal R.R. in Chi. Ill., AB 1258, slip op. at 3 (STB served Aug. 16, 2017); Hartwell First United Methodist Church—Adverse Aban. & Discontinuance—Hartwell R.R. & The Great Walton R.R., in Hart Cty., Ga., AB 1242, slip op. at 4 (STB served Aug. 30, 2016).

Publication of Notice of Intent. The Department asks for a partial waiver of 49 C.F.R. § 1152.20(a)(4), which requires publication of the notice at least once during each of three consecutive weeks in a newspaper of general circulation in each county in which any part of the line at issue is located. (Pet. 10.) The Department argues that this requirement will delay the proceeding and proposes instead that the required notice be published only once. The Board will deny this request, as newspaper publication is not onerous and ensures that all persons and entities with an interest in the Tahawus Branch are given notice and the opportunity to participate. Lackawaxen-Honesdale Shippers Ass'n, AB 1110, slip op. at 4. Further, requiring

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<sup>3</sup> The Department also requests a waiver of 49 C.F.R. § 1152.20(a)(2)(x), which requires service on Amtrak "if Amtrak operates over the involved line." (Pet. 9.) Because the Department states that Amtrak does not and has never operated on the Tahawus Branch, such a waiver is unnecessary.

three weeks of newspaper publication will not unduly delay this proceeding and will better ensure that the public is aware of the upcoming application. Id.; Boston & Me. Corp.—Adverse Discontinuance of Operating Auth.—Milford-Bennington R.R., AB 1256, slip op. at 5-6 (STB served June 23, 2017).

Form of Notice of Intent. The Department further seeks a waiver from the prescribed form of the notice of intent found at 49 C.F.R. § 1152.21. The Department proposes a modified notice, stating that the prescribed form is inappropriate for an adverse abandonment proceeding. (Pet. 10 & App. B.) The Board has approved form changes to the notice of intent in adverse abandonment cases when the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.21. See Hartwell First United Methodist Church, AB 1242, slip op. at 3. Because the proposed notice meets this criteria, the Board will grant the Department's unopposed request to modify the notice of intent.

Contents of Application. The Department seeks a waiver of several of the required items to be included in its adverse abandonment application under 49 C.F.R. § 1152.22, as well as a modification to the language of the required Federal Register notice. Specifically, the Department seeks a waiver of § 1152.22(a)(5) (SDM information), § 1152.22(b) (condition of property), § 1152.22(c) (service provided), § 1152.22(d) (revenue and cost data), and § 1152.22(e) (rural and community impact), and modification to the draft Federal Register notice required under § 1152.22(i). (Pet. 10-12 & App. C.) The Department contends that this information is outside of its control or is otherwise inconsistent with an adverse abandonment application. The Board will grant these unopposed waivers. See Hartwell First United Methodist Church, AB 1242, slip op. at 4. Furthermore, the Board finds that the Department's proposed modification to the Federal Register notice is in substantial compliance with 49 C.F.R. § 1152.22(i) and thus will grant the Department's unopposed request to modify. See Id.

Notice of Consummation. The Department seeks a waiver of the requirement under 49 C.F.R. § 1152.29(e)(2) that the abandonment be consummated within one year after the abandonment application is granted. (Pet. 12.) The Department states that it is inappropriate to place a time limit on an applicant to consummate an adverse abandonment because the third party does not have control over the timing on consummation until it obtains control of the property from the railroad. (Id.) The Board will grant this unopposed request. See Hartwell First United Methodist Church, AB 1242, slip op. at 5.

Offers of Financial Assistance. The Department seeks an exemption from the Board's offer of financial assistance (OFA) requirements under 49 U.S.C. § 10904 and a waiver of the corresponding procedures for OFAs at 49 C.F.R. § 1152.27. (Pet. 13.) The Board will grant this unopposed waiver request and, as explained below, the corresponding exemption request. The effect of granting an adverse abandonment is that the Board's primary jurisdiction is withdrawn, thus permitting state, local, or other Federal law to apply where there is no overriding Federal interest in interstate commerce. Hartwell First United Methodist Church, AB 1242, slip op. at 5. If the Board ultimately finds that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, it would be fundamentally inconsistent to provide for further Board regulation under the OFA provisions of

49 U.S.C. § 10904 and 49 C.F.R. § 1152.27. See Alloy Prop. Co., AB 1258, slip op. at 5; Hartwell First United Methodist Church, AB 1242, slip op. at 5.

Public Use. Similarly, the Department requests an exemption from 49 U.S.C. § 10905 and waiver of the corresponding regulations at 49 C.F.R. § 1152.28 regarding public use conditions. The Board will grant this unopposed waiver request. Again, should the Board decide to withdraw its primary jurisdiction over the Line, it should not then allow its jurisdiction to be invoked to impose a public use condition. See Hartwell First United Methodist Church, AB 1242, slip op. at 5. As explained below, the Board will likewise exempt the Department from the requirements at 49 U.S.C. § 10905.

Exemption Criteria. As indicated, the Department seeks exemptions from the following statutory provisions corresponding to Board regulations previously discussed: 49 U.S.C. § 10903(c)(2) (SDMs); § 10903(a)(3)(D) (service on significant users); § 10903(a)(3)(B) (posting); § 10904 (OFAs); and § 10905 (Public Use). The Board will grant these related, unopposed exemptions because the application of these provisions is not necessary here to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. Rather, these exemptions would provide the Department with a reasonable opportunity to make its case that there is no overriding present or future need for service on the Tahawus Branch. The exemptions would promote the RTP by eliminating unnecessary procedures and thus would expedite regulatory decisions (§ 10101(2)) and foster sound economic conditions in transportation (§ 10101(9)). Other aspects of the RTP would not be adversely affected. Additionally, application of the statutory provisions from which we are granting exemptions is not necessary to protect shippers from an abuse of market power.

It is ordered:

1. The petition for waivers and exemptions is granted in part as discussed above.
2. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.